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No. 762

In the Supreme Court of the United States

OCTOBER TERM, 1964

JULES I. LITTWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 9-16) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1964. The petition for a writ of certiorari was filed on December 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether testimony by government agents, relating to conversations between petitioner and another government agent regarding a bribe, which had been overheard on a listening device, was admissible.

2. Whether the court properly discontinued the playing of a recorded conversation when, after twenty five minutes, the quality of the recording was found to be poor.

3. Whether the court properly refused to grant a mistrial on a showing that witnesses who had testified answered certain questions put to them by other witnesses who had not testified.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Tennessee of bribery of an Internal Revenue agent in violation of 18 U.S.C. 201 and sentenced to imprisonment for 24 months, with eligibility for parole under 18 U.S.C. 4208(a)(2) at such time as the Board of Parole may determine (R. 26a-27a). On appeal (R. 43a-44a) the conviction was affirmed.

The pertinent facts of the bribery are given in the opinion of the court below (Pet. App. 9-11). The evidence relating to the narrow issues raised by petitioner here* may be summarized as follows:

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* The petition for certiorari does not rely upon the defense of entrapment which was rejected in the opinion of the court below.

1. Agent Sands testified that on August 29, 1962, while he was equipped with a hidden transmitting device and microphone strapped to his body, he had a conversation with petitioner in which they discussed taxes of the corporations involved and certain unallowable expenses. When petitioner asked whether $2,000 would be enough, Sands said "Yes" and that the payment should be made in Johnson City, Tennessee, rather than in New York City (R. 62a-66a). When Sands asked how petitioner happened to make the bribe offer, petitioner said that he was a good judge of character, and that after watching Sands for several days he decided he could offer him the money (R. 5b). Several government agents were permitted to testify over defense objection that they heard a broadcast of the August 29 conversation over a receiving device in their car (R. 127a-130a, 138a-139a, 141a-145a).

Sands, who was again wired for sound on September 24, 1962, testified that on that date petitioner placed an envelope containing $2,000 in Sands' valise for which Sands thanked him. When Sands asked whether the president of one of the corporations had given the money to petitioner, he replied "Yes" (R. 5b, 8b-9b; R. 66a-67a). Several government agents were allowed to testify that they heard on a receiving device a broadcast of the September 24 conversation (R. 161a, 176a-177a).

2. During the redirect examination of agent Elrod the government started to play, from the very beginning (upon direction by the court), a tape recording of the conversation between agent Sands and peti-

tioner on September 24, 1962. After listening to the recording about 25 minutes the court complained that it was unintelligible. The government attorney said that he had heard the recording, and that it would get better as the listener became accustomed to the voices (R. 190a-191a). This colloquy followed (R. 192a-194a):

> THE COURT: Have you been able to make any of this out? I don't want to shut off any competent evidence or legal evidence that either side has.
>
> MR. SMITH (government counsel): If the Court please, I think the recording has accomplished its purpose anyway. * * * I think the recording is an offer of evidence.
>
> THE COURT: Now, does the defendant have any objection?
>
> MR. FRIAR (petitioner's counsel): Yes, your Honor, it is my position that now that some part of it has been played, that it must be played in its entirety, because of the chance that there would have been a word or a remark or a phrase which might have come to a juror which would affect his ultimate decision. I might say - - - -
>
> THE COURT: Excuse me just a minute. Has any member of the jury heard a word, remark or phrase that you now feel, and be honest about it, this is an important thing, it is a little bit unusual, and whether we have a tendency to want to be facetious or funny about, this is important. Has anyone of you heard a word or remark or phrase that you now feel might affect your decision in any way, other than as compared with the fact that you had not had this machine in front of you; if so, please raise your

hand and be honest about it, because you are under oath to answer these questions truthfully. All right, Mr. Friar, what is the other part of it?

MR. FRIAR: The other part of the statement that I was going to make, your Honor, is that of course I have heard it, but having heard it, and Mr. Smith having said he has not heard this part, I have heard this part, and was following it on my notes, and was able to understand entire sentences which coincided with my notes, up to the point where the machine was stopped.

THE COURT: Your objection is overruled.

3. At the start of the trial the court ordered that all witnesses be excluded from the courtroom while the other witnesses were testifying. After several government witnesses had testified, petitioner's counsel, in the absence of the jury, moved for a mistrial on the ground that some witnesses who had testified, upon returning to the witness room, had talked with prospective witnesses (R. 161a-164a). Petitioner's counsel was permitted to question Christensen, a government witness who had not yet testified. He stated that witnesses who had already testified had returned to the witness room and talked about questions asked and their responses (R. 164a-165a). On cross-examination Christensen said that the discussion was general, such as "Is it rough, or did they ask you much?" The court inquired, "Mr. Christensen, did you hear anybody come back in there and say, in effect, that they asked me particular kinds of questions and I gave particular kinds of answer? Or anything of that sort?" Christensen answered,

"No, sir" (R. 10b). Petitioner's counsel announced that he had no other witness to offer, and the court overruled the motion for a mistrial (R. 11b).

ARGUMENT

1. Testimony by government agents as to the broadcasts they heard of the August 29 and September 24 conversations between petitioner and Sands, relating to the bribe, were clearly admissible in corroboration of Sands' testimony under *Lopez* v. *United States*, 373 U.S. 427. The purpose of the testimony resulting from the broadcasted conversations was purely corroborative; there was no attempt to obviate the need for putting Sands on the stand.

Petitioner argues that the government agents were not corroborating witnesses since they testified in part as to facts about which Sands did not testify, citing R. 121a, 127a-128a (Pet. 6, 7). These record citations refer to conversations between Sands and petitioner about personal family matters, the examination of corporation tax returns, and petitioner's reference to the fact that the $2,000 payment was to be in small bills. Contrary to petitioner's contention, the record shows that Sands had testified about these matters (R. 63a-66a). In any event, it is clear that the testimony of the government agents in its essential details was corroborative of the bribery and included nothing shown to be prejudicial to petitioner.

2. The court acted well within its discretion in ordering discontinuance of the playing of the tape recording of the conversation between petitioner and agent Sands on September 24, 1962. Even though the

introduction of the recording in evidence was proper under *Lopez* v. *United States*, 373 U.S. 427, the recording was of such poor quality that neither the prosecution nor the defense obtained any real advantage from the recording, which was unintelligible to the court and all the jurors. The court was not required to stultify the trial proceedings by wasting an additional 2½ hours on a recording which the jurors could not understand.

It is true that under the general doctrine of "opening the door" and "completeness," if one party puts in evidence a document or conversation which is detrimental to the opposing party, the latter may introduce the balance of the document or conversation to explain or rebut adverse inferences which might arise from the incomplete nature of the evidence introduced by his adversary. This rule, however, is subject to the qualification that only the other parts of the document or conversation which are relevant and throw light upon the parts already admitted become competent upon its introduction. There is no rule that either the whole document or conversation, or no part of it, is competent. *United States* v. *Dennis*, 183 F.2d 201, 229-230 (C.A. 2), affirmed, 341 U.S. 494; *United States* v. *Corrigan*, 168 F.2d 641, 645 (C.A. 2). Here there was no assurance that the remaining part of the recording would throw light upon the part already played (none of which the jurors had understood).

The conversation of September 24 was testified to by Sands and the agents who overheard the conver-

sation. Since petitioner's counsel had heard the complete recording before part of it was played at the trial (R. 193a), it is a reasonable assumption that if he had known of any specific part which would rebut or explain the parts played before the recording was discontinued, he would have been able to point out any passage that had any significance.

3. The court did not err in refusing to grant a mistrial on the ground that there was a violation of the rule directing a separation of the witnesses. The purpose of the rule is to obtain the witness's own version of the evidence without advice as to the testimony of other witnesses which might influence him to shape his testimony to make it consistent with that already given. This purpose was not subverted here, since the evidence showed that none of the witnesses who returned to the witness room after testifying stated the particular kinds of questions asked or the specific answers given. There was no showing of a wilful violation of the rule with knowledge or consent of government counsel. Refusal to grant a mistrial under the circumstances was a proper exercise of the court's sound discretion. *Holder* v. *United States*, 150 U.S. 91; *United States* v. *Bostic*, 327 F.2d 983 (C.A. 6); *United States* v. *Brooks*, 303 F.2d 851, 853 (C.A. 6), certiorari denied, 371 U.S. 889; *United States* v. *Leggett*, 326 F.2d 613 (C.A. 4), certiorari denied, 377 U.S. 955.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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